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FURTHER PROMOTION AND ENCOURAGEMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, INCLUDING THE QUESTION OF THE PROGRAMME AND METHODS OF WORK OF THE COMMISSION

ALTERNATIVE APPROACHES AND WAYS AND MEANS WITHIN THE UNITED NATIONS SYSTEM FOR IMPROVING THE EFFECTIVE ENJOYMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85

A framework for model legislation on domestic violence

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Introduction

1. This framework for model legislation outlines important elements which are integral to comprehensive legislation on domestic violence. The objective of this model legislation is to serve as a drafting guide to legislatures and organizations committed to lobbying their legislatures for comprehensive legislation on domestic violence.

I. DECLARATION OF PURPOSE

2. The purpose of this legislation is to:

(a) Comply with international standards sanctioning domestic violence;

(b) Recognize that domestic violence is gender-specific violence directed against women, occurring within the family and within interpersonal relationships;

(c) Recognize that domestic violence constitutes a serious crime against the individual and society which will not be excused or tolerated;

(d) Establish specific legislation prohibiting violence against women within interpersonal and family relationships, protecting victims of such violence and preventing further violence;

(e) Create a wide range of flexible and speedy remedies (including remedies under special domestic violence legislation, penal and civil remedies) to discourage domestic violence and harassment of women within interpersonal relationships and within the family and protect women where such violence has taken place;

(f) Assure victims of domestic violence the maximum protection in cases ranging from physical and sexual to psychological violence;

(g) Establish departments, programmes, services, protocols and duties, including but not limited to shelters, counselling programmes and job-training programmes to aid victims of domestic violence;

(h) Facilitate enforcement of the criminal laws by deterring and punishing violence against women within special interpersonal relationships;

(i) Enumerate and provide by law comprehensive support services, including but not limited to:

(i) Emergency services for victims of abuse and their families;

(ii) Support programmes that meet the specific needs of victims of abuse and their families;

(iii) Education, counselling and therapeutic programmes for the abuser and the victim;

(iv) Programmes to assist in the prevention and elimination of domestic violence which includes raising public awareness and public education on the subject.

(j) Expand the ability of law enforcement officers to assist victims and to enforce the law effectively in cases of domestic violence and to prevent further incidents of abuse;

(k) Train judges to be aware of the issues relating to child custody, economic support and security for the victims in cases of domestic violence by establishing guidelines for protection orders and sentencing guidelines which do not trivialize domestic violence;

(l) Provide for and train counsellors to support police, judges and the victims of domestic violence and to rehabilitate perpetrators of domestic violence;

(m) Develop a greater understanding within the community of the incidence and causes of domestic violence and encourage community participation in eradicating domestic violence.

II. DEFINITIONS

3. It is urged that States adopt the broadest possible definitions of acts of domestic violence and relationships within which domestic violence occurs, bearing in mind that such violations are not as culture-specific as initially observed, since increasing migration flows are blurring distinctive cultural practices, formally or informally. Furthermore, the broadest definitions should be adopted with a view to compatibility with international standards.

4. States are urged to enact comprehensive domestic violence legislation which integrates criminal and civil remedies rather than making marginal amendments to existing penal and civil laws.

A. Domestic violence

5. Legislation shall clearly state that violence against women in the family and violence against women within interpersonal relationships constitute domestic violence.

6. The language of the law must be clear and unambiguous in protecting women victims from gender-specific violence within the family and intimate relationships. Domestic violence must be distinguished from intra-family violence and legislated for accordingly.

B. Relationships to be regulated

7. The relationships which come within the purview of legislation on domestic violence must include: wives, live-in partners, former wives or partners, girl-friends (including girl-friends not living in the same house), female relatives (including but not restricted to sisters, daughters, mothers) and female household workers.

8. States should not permit religious or cultural practices to form an impediment to offering all women this protection.

9. States should offer this protection to non-national women and hold non-national men accountable to the same standards as men of their nationality.

10. There shall be no restrictions on women bringing suits against spouses or live-in partners. Evidence laws and criminal and civil procedure codes shall be amended to provide for such contingencies.

C. Acts of domestic violence

11. All acts of gender-based physical, psychological and sexual abuse by a family member against women in the family, ranging from simple assaults to aggravated physical battery, kidnapping, threats, intimidation, coercion, stalking, humiliating verbal abuse, forcible or unlawful entry, arson, destruction of property, sexual violence, marital rape, dowry or bride-price related violence, female genital mutilation, violence related to exploitation through prostitution, violence against household workers and attempts to commit such acts shall be termed "domestic violence".

III. COMPLAINT MECHANISMS

12. The law shall provide for victims, witnesses of domestic violence, family members and close associates of victims, State and private medical service providers and domestic violence assistance centres to complain of incidents of domestic violence to the police or file action in court.

A. Duties of police officers

13. The law shall provide that police officers shall respond to every request for assistance and protection in cases of alleged domestic violence.

14. Police officers shall not assign a lower priority to calls concerning alleged abuse by family and household members than to calls alleging similar abuse and violations by strangers.

15. Police shall respond at the scene of domestic violence when:

(a) The reporter indicates that violence is imminent or is in progress;

(b) The reporter indicates that an order relative to domestic violence is in effect and is likely to be breached;

(c) The reporter indicates that domestic violence has occurred previously.

16. The police shall respond promptly even where the reporter is not the victim of the violence but is a witness of the violence, a friend or a relative of the victim, or is a health provider or professional working at a domestic violence assistance centre.

17. On receiving the complaint the police shall:

(a) Interview the parties and witnesses, including children, in separate rooms to ensure an opportunity to speak freely;

(b) Record the complaint in detail;

(c) Advise the victim of her rights as outlined below;

(d) Fill out and file a domestic violence report as provided for by the law;

(e) Provide or arrange transport for the victim to the nearest hospital or medical facility for treatment, if it is required;

(f) Provide or arrange transport for the victim and the victim's children or dependents to a safe place or shelter, if it is required;

(g) Provide protection to the reporter of violence;

(h) Arrange for the removal of the offender from the home and, if that is not possible and if the victim is in continuing danger, arrest the offender.

B. Alternative complaint procedure

18. The victim, witness or reporter may file a complaint alleging an act of domestic violence in the judicial division where:

(a) The offender resides;

(b) The victim resides;

(c) Where the violence took place;

(d) Where the victim is temporarily residing if she has left her residence to avoid further abuse.

19. The victim may file a complaint alleging an act of domestic violence with a State or private health facility, which shall direct it to the police in the judicial division where that health facility is located.

20. A relative, friend or person from whom the victim requests assistance may file a complaint alleging an act of domestic violence with the police, who shall investigate it accordingly.

C. Statement of the victim's rights

21. The purpose of the statement of the victim's rights is to acquaint the victim with the legal remedies available to her during the initial stage when she complains of an infringement of her legal rights. It also outlines the duties of the police and the judiciary in relation to the victim:

(a) The police officer shall communicate to the victim in a language understood by the victim, identifying himself or herself by name and badge number. The law requires that the police officer inform the victim of domestic violence that, if a crime is alleged to have been committed against her, the officer must either arrest the suspect immediately, persuade him to leave the household or remove him from the household;

(b) The officer must drive the victim or help her find transport to a medical facility to have her injuries attended to;

(c) If the victim wants to leave her residence the officer must help her to find transport to a safe place or shelter;

(d) The officer shall take all reasonable steps to ensure that the victim and her dependents are safe;

(e) The officer must provide the victim with a written statement of the legal procedures available to her, in a language that she understands. The statement must indicate that:

(i) The law provides that the victim may seek an ex parte restraining court order and/or a court order prohibiting further abuse against the victim, her dependents, anyone in her household or anyone from whom she requests assistance and refuge;

(ii) The restraining order and/or court order shall protect the victim's property or property held in common from destruction;

(iii) The restraining order may order the offender to vacate the family home;

(iv) In the event of the violence taking place during the night, at weekends or on public holidays, the victim must be informed of emergency relief measures to obtain a restraining order by calling the judge on duty;

(v) The victim need not hire a lawyer to get an ex parte restraining order or court order;

(vi) The offices of the clerk of the court shall provide forms and non-legal assistance to persons seeking to proceed with ex parte restraining orders or court orders. To obtain a court order, the victim must be advised to apply to the court in the prescribed district/jurisdiction;

(vii) The police shall serve the ex parte restraining order on the offender.

D. Domestic violence report

22. It shall be the duty of the police officer responding to a domestic violence call to complete a domestic violence report which shall be a part of the record. The report should be collated by the Department of Justice and (where applicable) the family court.

23. The domestic violence report shall be on a form prescribed by the police commissioner. It shall include but not be limited to:

(a) The relationship of the parties;

(b) The sex of the parties;

(c) Information regarding the occupational and educational levels of the parties;

(d) The time and date the complaint was received;

(e) The time the officer began investigation of the complaint;

(f) Whether children were involved and whether the domestic violence took place in the presence of children;

(g) The type and extent of the abuse;

(h) The number and type of weapons used;

(i) The amount of time taken in handling the case and the actions taken by the officer;

(j) The effective date and terms of the order issued concerning the parties;

(k) Any other data necessary for a complete analysis of all the circumstances leading to the alleged incident of domestic violence.

24. It shall be the duty of the police commissioner to compile and report annually to the Departments of Justice/Women's Affairs and the Parliament all data collected from the domestic violence reports.

25. The annual report shall include but not be limited to:

(a) The total number of reports received;

(b) The number of reports made by the victims of each sex;

(c) The number of reports investigated;

(d) The average time lapse in responding to each report;

(e) The type of police action taken in disposing cases including the number of arrests.

IV. DUTIES OF JUDICIAL OFFICERS

A. Ex parte temporary restraining order

26. An ex parte order may be issued on the application of a victim of violence in circumstances where the defendant chooses not to appear in court or cannot be summoned because he is in hiding. An ex parte order may contain a preliminary injunction against further violence and/or preventing the abuser/defendant from disturbing the victim/plaintiff's use of essential property, including the common home.

27. It is also recommended that a wider category of persons besides the victim of violence apply for a restraining order. It is conceivable that the victim may not be in a position to have access to the legal system. It is also conceivable that witnesses and persons offering assistance to the victim may also be in danger of violence.

28. Where a situation of grave danger exists to the life, health and well-being of the victim and she is unlikely to be safe until a court order is issued, the victim/plaintiff, a relative or welfare worker may apply to a judge or magistrate on duty to provide emergency relief, such as an ex parte temporary restraining order to be issued against the abuser within 24 hours of violence occurring.

29. The ex parte temporary restraining order may:

(i) Compel the offender to vacate the family home;

(ii) Regulate the offender's access to dependent children;

(iii) Restrain the offender from contacting the victim at work or other places frequented by the victim;

(iv) Compel the offender to pay the victim's medical bills;

(v) Restrict the unilateral disposal of joint assets;

(vi) Inform the victim and the offender that if the offender violates the restraining order, he may be arrested and criminal charges brought against him;

(vii) Inform the victim that, notwithstanding the use of a restraining order under domestic violence legislation, she can request the prosecutor to file a criminal complaint against the offender;

(viii) Inform the victim that, notwithstanding the use of a restraining order under domestic violence legislation and application for criminal prosecution, she can initiate a civil process and sue for divorce, separation, damages or compensation;

(xi) Require each party to fulfil his/her continuing duty to inform the court at each proceeding for an order of protection at any civil litigation, proceeding in juvenile court and/or criminal proceedings involving either party.

30. Emergency relief would include an ex parte temporary restraining order, to remain in effect until a court order is issued but for not more than 10 days after the ex parte temporary restraining order has been issued.

31. The plaintiff must be informed of the following:

(a) That, notwithstanding use of an ex parte restraining order under domestic violence legislation, she can apply for a court order to protect her from further violence or for a renewal of that court order, and/or request the prosecutor to file a criminal complaint against the defendant;

(b) That an application for an ex parte restraining order in no way affects her access to other civil remedies such as the right to apply for a judicial separation, divorce or compensation for damages;

(c) That, on 24 hours' notice to the plaintiff, the defendant may move for a dissolution or modification of the temporary restraining order.

32. Non-compliance with an ex parte restraining order shall result in prosecution for contempt of court proceedings, a fine and imprisonment.

B. Protection orders

33. Application for a protection order may be made by the victim, a relative, a welfare worker or person assisting the victim of domestic violence.

34. Application for protection orders may be made on the expiry of ex parte restraining orders or independently of such restraining orders.

35. Protection orders may operate to protect the victim, a relative, a welfare worker or person assisting the victim of domestic violence from further violence or threats of violence.

36. Judges should be required to conduct hearings within 10 days of the complaint and application for a protection order.

37. Judges should uphold the provisions outlined in the victim's statement of rights.

38. The court order may provide any or all of the following relief:

(a) Restrain the offender/defendant from causing further violence to the victim/plaintiff, her dependents, other relatives and persons who give her assistance from domestic abuse;

(b) Instruct the defendant to vacate the family home, without in any way ruling on the ownership of such property;

(c) Instruct the defendant to continue to pay the rent or mortgage and to pay maintenance to the plaintiff and their common dependents;

(d) Instruct the defendant to hand over the use of an automobile and/or other essential personal effects to the plaintiff;

(e) Regulate the defendant's access to dependent children;

(f) Restrain the defendant from contacting the plaintiff at work or other places frequented by the plaintiff;

(g) Upon finding that the defendant's use or possession of a weapon may pose a serious threat of harm to the plaintiff, prohibit the defendant from purchasing, using or possessing a firearm or any such weapon specified by the court;

(h) Instruct the defendant to pay the plaintiff's medical bills, counselling fees or shelter fees;

(i) Prohibit the unilateral disposition of joint assets;

(j) Inform the plaintiff and the defendant that, if the defendant violates the restraining order, he may be arrested with or without a warrant and criminal charges brought against him;

(k) Inform the plaintiff that, notwithstanding the use of a restraining order under domestic violence legislation, she can request the prosecutor to file a criminal complaint against the defendant;

(l) Inform the plaintiff that, notwithstanding the use of a restraining order under domestic violence legislation, she can activate the civil process and sue for divorce, separation, damages or compensation;

(m) Conduct hearings in camera to protect the privacy of the parties.

39. The burden of proof in these proceedings is on the accused to demonstrate that such domestic violence did not take place.

40. Judges should order the dispatch of copies of all protection/restraining orders issued to the police zones where the plaintiff and those protected by the order reside, within 24 hours of the issuing order.

41. Compliance with protection orders shall be monitored by the police and the courts. Violation of a protection order is a crime. Non-compliance shall result in a fine, contempt of court proceedings and imprisonment.

42. Where the plaintiff files an affidavit that she does not have the funds to pay the costs of filing for an ex parte restraining order or a protection order, the orders shall be filed without the payment of fees.

43. Mala fide and unjustified claims for a protection order may move the court to order the plaintiff to pay costs and damages to the defendant.

V. CRIMINAL PROCEEDINGS

44. The prosecuting attorney or attorney-general shall develop, adopt and put into effect written procedures for officials prosecuting crimes of domestic violence.

45. When a court dismisses criminal charges in a crime involving domestic violence, the specific reasons for dismissal must be recorded in the court file.

46. In criminal actions concerning domestic violence, the prosecuting attorney shall charge in the information sheet that the alleged act is one of domestic violence.

47. The victim's testimony shall be sufficient for prosecution. No move to dismiss a complaint shall be made solely on the grounds of uncorroborated evidence.

48. Upon conviction for a domestic violence offence, the judgment shall so indicate the results of the case.

49. During the trial phase, the defendant accused of domestic violence shall have no unsupervised contact with the plaintiff.

50. The issue of a restraining order or protection order may be introduced as a material fact in subsequent criminal proceedings.

51. Depending on the nature of the offence, and where a defendant is charged for the first time with a minor domestic violence offence and pleads guilty, a deferred sentence and counselling may be imposed, along with a protection order, provided that the consent of the victim is obtained.

52. Upon conviction of a defendant for a serious crime of domestic violence, the court may order a term of incarceration and counselling.

53. Enhanced penalties are recommended in cases of domestic violence involving repeat offences, aggravated assault and the use of weapons.

54. Counselling shall not be recommended in lieu of a sentence in cases of aggravated assault.

55. Clear sentencing guidelines shall be established.

VI. CIVIL PROCEEDINGS

56. A protection order may be issued while civil proceedings for divorce, judicial separation or compensation are pending.

57. In these circumstances, protection orders may be issued in addition to and not in lieu of civil proceedings.

58. Protection orders and restraining orders may be issued independently, unaccompanied by an application for divorce or judicial separation.

59. The issuance of a restraining order or protection order may be introduced as a material fact in subsequent civil proceedings.

VII. PROVISION OF SERVICES

A. Emergency services

60. The State must provide emergency services which shall include:

(i) Seventy-two hour crisis intervention services;

(ii) Constant access and intake to services;

(iii) Immediate transportation from the victim's home to a medical centre, shelter or safe haven;

(iv) Immediate medical attention;

(v) Emergency legal counselling and referrals;

(vi) Crisis counselling to provide support and assurance of safety;

(vii) Confidential handling of all contacts with victims of domestic violence and their families.

B. Non-emergency services

61. States must provide non-emergency services which shall include:

(a) Delivery of services to assist in the long-term rehabilitation of victims of domestic violence through counselling, job training and referrals;

(b) Delivery of services to assist in the long-term rehabilitation of abusers through counselling;

(c) Programmes for domestic violence which are administered independently of welfare assistance programmes;

(d) Delivery of services in cooperation and coordination with public and private, State and local services and programmes.

C. Training of police officials

62. The police department shall establish and maintain an education and training programme for police officers to acquaint them with:

(a) The nature, extent, causes and consequences of domestic violence;

(b) The legal rights and remedies available to victims of domestic violence;

(c) The services and facilities available to victims and abusers;

(d) The legal duties imposed on police officers to make arrests and to offer protection and assistance;

(e) Techniques for handling incidents of domestic violence that minimize the likelihood of injury to the officer and promote the safety of the victim and her dependents.

63. Every police cadet should be trained to respond to domestic violence cases.

64. Special units should also be established where police officers receive intensive and specialized training to handle more complex cases.

65. Educators, psychologists and victims should participate in seminar programmes to sensitize the police.

D. Training of judicial officers

66. Provision shall be made to conduct on-going training programmes for judicial officers on the handling of domestic violence cases. Training shall include guidelines on:

(i) The issuing of ex parte restraining orders;

(ii) The issuing of protection orders;

(iii) Guidance to be given to victims on available legal remedies;

(iv) Sentencing guidelines.

67. Training shall include an initial course for a prescribed number of hours and an annual review for a prescribed number of hours.

68. Special family courts should also be established and the judiciary should be provided with intensive and specialized training to handle more complex cases.

E. Training of counsellors

69. States shall provide trained counsellors to support the police, judges, victims of domestic violence and perpetrators of violence.

70. The law shall mandate counselling programmes for perpetrators as a supplement to and not as an alternative to the criminal justice system.

71. Counselling programmes must be designed to:

(i) Help the perpetrator take responsibility for his violence and make a commitment not to inflict further violence;

(ii) Educate the perpetrator on the illegality of violence.

72. Funding for counselling and perpetrator programmes should not be taken from resources assigned to victims of violence.

73. The law should provide but not mandate counselling for victims of violence. Counselling for victims of violence must be:

(a) Provided as a free service;

(b) Empowering to the victim and assist her in deciding on short-term and long-term strategies to protect herself from further violence and to restore the normality of her life.